

Why Police Have a Legal Duty to Provide Medical Aid to People They Shoot

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I. INTRODUCTION

Police-involved shootings have become one of the most contentious issues in the United States, especially when the individual shot is African American. I have frequently been asked by different media outlets to offer my opinion on the legality of such shootings.¹ Once I received a different type of request: to watch a video of a police shooting involving the Charlotte-Mecklenburg Police Department (“CMPD”) and comment on the failure of the police to provide immediate medical assistance to an individual who had been shot by one of the department’s officers.² That experience led me to recall other instances of high profile cases in which the police failed to render assistance to an arrestee or pretrial detainee who was in distress as a result of police conduct. The most prominent case that came to mind was the Tamir Rice shooting. Tamir Rice was a twelve-year-old African-American boy who was shot and killed by a Cleveland, Ohio police officer who mistakenly believed that a toy gun Rice was playing with was a real gun. Community outrage ensued, not only because of the shooting but also because of the image caught on videotape of the

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¹ See, e.g., Deana Paul, *Why the Dallas Officer who killed her neighbor might have trouble with a deadly force defense*, WASH. POST (September 13, 2018), <https://www.washingtonpost.com/nation/2018/09/13/why-dallas-officer-who-killed-her-neighbor-might-have-trouble-with-deadly-force-defense/>; Manny Fernandez, *North Charleston Police Shooting Not Justified, Experts Say*, N.Y. TIMES (April 9, 2015), <https://www.nytimes.com/2015/04/10/us/north-charleston-police-shooting-not-justified-experts-say.html>; Stephanie Bunao, *Law Professor says police actions in shooting were justified*, CHARLOTTE OBSERVER (April 15, 2019), <https://www.charlotteobserver.com/latest-news/article229288844.html>; Fred Clasen-Kelly, *Stiff sanctions rare for CMPD officers after shootings*, CHARLOTTE OBSERVER (July 17, 2015), <https://www.charlotteobserver.com/news/local/crime/article27453070.html>; Scott Daugherty, *Video Shows Portsmouth Police officer shoot armed man in back as he runs from burglary*, THE VIRGINIAN-PILOT (Apr. 23, 2018), https://www.pilotonline.com/news/crime/article_06747026-44d9-11e8-8a17-d344316a64fa.html; Kelly Well, *Cops Killed Unarmed Stephon Clark, Then Cut Their Audio. That’s Unusual, Expert Says*, THE DAILY BEAST (March 23, 2018), <https://www.thedailybeast.com/cops-killed-unarmed-stephon-clark-then-cut-their-audio-thats-unusual-expert-says>.

² See Ames Alexander & Anna Douglas, *Under Criticism, Charlotte police push to get faster medical help to shooting victims*, CHARLOTTE OBSERVER (April 15, 2019), <https://www.charlotteobserver.com/news/local/article229572044.html>.

police standing around doing nothing to assist Rice before he died.³ More recently in another high-profile case, Amber Guyger, a white police officer, shot and killed a black man after she mistakenly entered his apartment believing him to be an intruder in her own apartment. There was outrage not only over the shooting of an innocent person while in his home, but also over her failure to provide first aid to the victim. Instead, she sent text messages to her boyfriend.⁴

Why didn't even one of the officers on the scene immediately render medical attention to the arrestee who was clearly in distress as a result of their actions? It didn't seem right to me that the officers stood by doing nothing while an individual whom they shot was dying. But I did not know whether the police were obligated to do anything more than call paramedics. I therefore decided to research the question that perplexed me and that often outrages the public when they observe similar police indifference to the suffering of a recent victim of their own violent use of force. As I researched, I learned that whether such an obligation exists is more complicated than I would have expected. Accordingly, this article first proposes that police should be trained to assist those whom they have shot. The article also proposes that police officers should have a legal duty to provide first aid to the best of their abilities under the circumstances to any injured victim they encounter, to include those whose injuries are the result of police action. The foundation for this proposal relies on two analogies: the 8th Amendment requirement that corrections officers provide immediate medical assistance to prisoners,⁵ and the obligations imposed by international humanitarian law (the laws of war) and more specifically the first Geneva Convention of 1949 (the "wounded and sick" Convention), a treaty binding on the United States and all other nations of the world, which mandates that armed forces provide aid to enemy and friendly casualties during conflict whenever doing so is operationally feasible.⁶

³ See Shaila Dewan & Richard A. Oppel, Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html?searchResultPosition=1> ("Officers Garmback and Loehmann did not check Tamir's vital signs or perform first aid in the minutes after he was shot.").

⁴ See Jennifer Emily, LaVendrick Smith, & Dana Branham, *First day of Amber Guyher's murder trial focuses on her relationship, sexual texts with police partner*, DALLAS MORNING NEWS (September 23, 2019), <https://www.dallasnews.com/news/crime/2019/09/23/first-day-of-amber-guyher-s-murder-trial-focuses-on-her-relationship-sexual-texts-with-police-partner/police-partner/>.

⁵ See *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁶ Article 12, second paragraph, of the 1949 Geneva Convention provides that members of the armed forces who are wounded or sick shall be "cared for by the Party to the conflict in whose power they may be . . . [T]hey shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created." See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

II. POLICE USE OF DEADLY FORCE

For a long time, there was no national data on the number of police involved shootings. As these shootings started getting national attention and generating controversy, media outlets and the federal government have begun to compile the data. Since 2015, the *Washington Post* has kept track of the number of fatal police shootings nationwide.⁷ According to the *Post*, about 1,000 persons have been killed by the police every year since 2018.⁸

There are approximately 18,000 law enforcement agencies in the United States and these agencies have a variety of policies and procedures regarding the use of force.⁹ The U.S. Supreme Court has outlined broad principles on the constitutionality of the use of deadly force under the Fourth Amendment and these agencies have developed policies and practices in response to the principles articulated by the Court.¹⁰ The Court has determined that there are two instances in which police officers are justified in using deadly force. First, when an officer uses force in response to a threat or perceived threat, the principles of *Graham v. Connor*¹¹ control whether the use of force is constitutional. In *Graham*, the Court held that an officer's use of force is judged against a standard of objective reasonableness pursuant to the reasonableness "touchstone" for assessing Fourth Amendment compliance.¹² Whether an officer's use of force was reasonable depends on the facts and circumstances of each particular case, the severity of the crime, and whether the suspect is resisting arrest or attempting to evade arrest.¹³ The Court emphasized that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."¹⁴ Finally, according to the Court, in judging the reasonableness of the officer's actions, the officer's intent is irrelevant: "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an

⁷ Statistics on police involved shootings in the United States are available at <https://www.washingtonpost.com/graphics/investigations/police-shootings-database/>.

⁸ *Id.*

⁹ See *Critical Issues in Policing Series; Guiding Principles on Use of Force*, POLICE EXECUTIVE RES. F., at 15 (March 2016), <https://www.policeforum.org/assets/guidingprinciples1.pdf>.

¹⁰ See *Graham v. Connor*, 490 U.S. 386 (1989); *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹¹ *Graham*, 490 U.S. at 394–95.

¹² *Id.* at 395.

¹³ *Id.* at 396.

¹⁴ *Id.*

objectively unreasonable use of force constitutional.”¹⁵ Some scholars have criticized the deference that the Supreme Court has given to the police when using deadly force. They argue that the “reasonableness” standard has provided police with a blank check to use deadly force which has resulted in terrible consequences for minority communities.¹⁶

Second, in *Tennessee v. Garner*,¹⁷ the Court addressed the circumstances in which the police use of deadly force is permissible in order to prevent the escape of a fleeing suspect. The Court again applied the reasonableness standard under the Fourth Amendment.¹⁸ The Court held that it would be unconstitutional for the police to use deadly force to prevent the escape of an individual who has not committed a serious crime and who does not pose a danger to the public or the officer.¹⁹ The Court, however, held that an officer could use deadly force in order to prevent the escape of a dangerous felon.²⁰

Although the Supreme Court has addressed the circumstances in which police are justified in using deadly force, the Court has not considered the obligation of police officers to render aid to those whom they have shot or injured. The remainder of this article will explain why police should have a duty to assist those whom they have shot or injured regardless of whether the shooting was justified.

III. FAILURE TO RENDER AID

The Charlotte-Mecklenburg incident, where a police officer shot and killed Danquirs Franklin, provides a useful illustration of the necessity of addressing the question presented herein.²¹ The officer’s actions were controversial not only because she shot Franklin, but also as a result of the failure by her and the other

¹⁵ *Id.* at 397.

¹⁶ See Paul Butler, *The System is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425 (2016) (arguing that it is legal police conduct that perpetuates racial inequality in the criminal justice system—not illegal police misconduct.); Osagie K. Obasogie & Zachary Newman, *The Futile Fourth Amendment: Understanding Police Excessive Force Doctrine Through An Imperial Analysis*, 112 NW. U.L. REV. 1465, 1498–99 (2018) (concluding that the Supreme Court’s doctrinal choice to evaluate police excessive force claims under the Fourth Amendment rather than under Equal Protection has contributed to the perpetration of police excessive use of force in many communities of color.); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 128 (2017) (arguing that “[a] significant part of the problem [police killings of African Americans] is Fourth Amendment law.”).

¹⁷ *Tennessee v. Garner*, 471 U.S. 1 (1985).

¹⁸ *Id.* at 7–8.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 11–12.

²¹ See Bunao, *supra* note 1.

officers on the scene to immediately render aid.²² Although another police officer called the paramedics, an eleven minute video of the shooting does not show any of the officers giving first aid to Franklin.²³ About four minutes elapsed after the shooting before the first emergency medical personnel arrived. As one expert stated, “that’s a real long time for a critically injured gunshot victim to be on the ground without any assistance at all.”²⁴ Many in the Charlotte-Mecklenburg community were outraged because the officers were seen in the video “ talking about securing witnesses without paying much attention to the subject who is lying on the ground bleeding.”²⁵

There have been similar, high-profile instances in which police failed to render assistance after using deadly force. As discussed earlier, there was significant community outrage not only as a result of Tamir Rice being shot, but also as a result of the video showing police on the scene failing to provide first aid to Rice during the immediate aftermath of the shooting.²⁶ In Louisville, Kentucky, three police officers were executing a search warrant during which Breonna Taylor was shot and killed in her own home.²⁷ No effort was made to save her after the shooting.²⁸ In Tulsa, Oklahoma, a video of the shooting of Terrence Crutcher was also released showing the police standing around rather than attending to Crutcher, who later died at a local hospital.²⁹ The public has witnessed these incidents and it is difficult for many to understand why the police would not render aid to a human in distress even if they believe that their actions were justified. This public outrage is exacerbated by the fact that the officers who fail to render first aid frequently are white while the suspect who has been shot and is in need of first aid is African American.

Another high profile police-involved shooting illustrates the importance of immediate police action. On August 23, 2020, Kenosha Police attempted to arrest Jacob Blake based on an outstanding arrest warrant after they received a call about

²² See Alexander & Douglas, *supra* note 2.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ See Tessa Duvall and Darcy Costello, *Breonna Taylor was briefly alive after police shot her. But no one tried to treat her*, LOUISVILLE COURIER JOURNAL (Aug. 31, 2020), <https://www.courier-journal.com/story/news/crime/2020/07/17/breonna-taylor-lay-untouched-20-minutes-after-being-shot-records/5389881002/>.

²⁸ *Id.*

²⁹ See Tom Dart & Joanna Walters, *Tulsa police under scrutiny for delayed medical aid given to Terrence Crutcher*, THE GUARDIAN (September 22, 2016), <https://www.theguardian.com/us-news/2016/sep/22/tulsa-police-terence-crutcher-medical-assistance>.

a domestic complaint involving Blake.³⁰ After Blake refused to submit to the police and approached his automobile with his three children in the car, a white police officer shot Blake seven times in the back.³¹ Although the shooting left Blake paralyzed, Blake likely survived as a result of the police administering immediate first aid to him.³²

The situation that a police officer faces after shooting a suspect is analogous to the situation faced by a soldier during combat. The nature of both jobs may require that they seriously wound and kill others. However, unlike police officers, the combat soldier has a duty to provide first aid to those whom he has wounded in the battlefield. The United States Army recognizes the imperative for immediate assistance after a casualty. Its First Aid manual provides that, “When a casualty is first encountered it is imperative that the responder quickly and accurately assess what has occurred, determine the nature and extent of injuries and what (if any) first aid measures are appropriate and necessary.”³³

There are multiple reasons why an officer may not render aid to a suspect after a shooting as will be explained in this article. Some of these reasons might arguably align with the reason why a soldier in combat delays or neglects to render aid: reaching and caring for the victim is simply not feasible in the tactical situation. But none of the high-profile incidents discussed above suggest such a justification. As a result, they raise an extremely troubling question: do officers routinely omit to provide such aid based on the instruction or assumption that they are not legally obligated to do so; or worse, that they are prohibited from doing so by their departments?

Research of the policies of police departments around the nation in order to determine an officer’s obligations after a police-involved shooting reveal that many departments have no policy at all that addresses the issue. In many jurisdictions the officer is only required to contact paramedics following a use of deadly force.³⁴ In other jurisdictions, whether to provide first aid is left to the discretion of the police

³⁰ See Christina Morales, *What We Know About the Shooting of Jacob Blake*, N.Y. TIMES (Sept. 10, 2020), <https://www.nytimes.com/article/jacob-blake-shooting-kenosha.html>.

³¹ *Id.*

³² See Meg Jones, *Kenosha Police shoot man; video of incident appears to show officer firing several shots into his back at close range*, MILWAUKEE JOURNAL SENTINEL (Aug. 23, 2020), <https://www.jsonline.com/story/news/crime/2020/08/23/wisconsin-police-shooting-kenosha-cops-shoot-man-sunday-evening/3427347001/>.

³³ See Section III—General Principles 1-51 of the Army First Aid Manual (Jan. 2016), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14135_TC%204-02x1%20C2%20INCL%20FINAL%20WEB.pdf.

³⁴ See, e.g., New Orleans Police Department Police Manual, 300.8 (2013), <https://static1.squarespace.com/static/56996151cbced68b170389f4/t/569adafed82d5e0d876a81b2/1452989185205/NOLA+use+of+force+policy.pdf>. (“Medical Assistance shall be obtained for any person who exhibits signs of physical distress who has sustained visible injury, expresses a complaint of injury or continuing pain, or who was rendered unconscious.”).

officers on the scene.³⁵ In Charlotte-Mecklenburg, for instance, an officer is only required to immediately request medical assistance.³⁶ As for first aid, an officer may “apply any first aid they are trained and certified to apply.”³⁷ In Cincinnati, officers may administer CPR or basic first aid.³⁸ A minority of departments require an officer to administer first aid following the use of deadly force. For instance, the Seattle police manual provides that “[f]ollowing a use-of-force, officers shall render or request medical aid, if needed or if requested by anyone, as soon as reasonably possible.”³⁹ In response to the Tamir Rice shooting and outcry after police failed to render first aid to him, the Cleveland policy was revised. Officers who use deadly force must immediately request Emergency Medical Services “while providing emergency first aid.”⁴⁰ Most departments that do require or leave to the officer’s discretion whether to administer first aid condition the providing of first aid on the scope of the officer’s training. In Seattle, the policy states that “officers will render aid within the scope of their training.”⁴¹

In the following section, I will provide arguments as to why some believe officers should not be required to provide first aid after the use of deadly force.

IV. ARGUMENTS AGAINST PROVIDING FIRST AID

There are several arguments against requiring police to provide first aid to individuals whom they shoot. First, an officer may not have adequate training in first aid. Many officers are not trained to stop the flow of blood and they may not be in possession of the proper equipment to treat a gunshot wound. By providing first aid inadequately, the officer may open both himself and the department to legal claims based on negligence. Second, by providing first aid, an officer may in some circumstances endanger his own life. Third, officers already have many duties at a

³⁵ See, e.g., CHARLOTTE-MECKLENBURG POLICE DEP’T, INTERACTIVE DIRECTIVES GUIDE § 600-018 (2013).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See CINCINNATI POLICE DEPARTMENT USE OF FORCE POLICY §12.545 (2019), <https://www.cincinnati-oh.gov/police/assets/File/Procedures/12545.pdf> (“[f]ollowing any use of force resulting in a citizen’s injury, officers will summon Cincinnati Fire Department (CFD) personnel to provide emergency medical treatment. Once the scene is stabilized and it is safe to do so, officers may administer CPR or basic first aid, if appropriate.”).

³⁹ SEATTLE POLICE DEPARTMENT MANUAL § 8.200-7 (2019), <http://www.seattle.gov/police-manual/title-8---use-of-force/8200---using-force>.

⁴⁰ CLEVELAND DIVISION OF POLICE, GENERAL POLICE ORDER 2.01.03, (Jan. 1, 2018), http://www.city.cleveland.oh.us/sites/default/files/forms_publications/01.10.2018General.pdf?id=12398.

⁴¹ SEATTLE POLICE DEPARTMENT MANUAL § 8.200-7, *supra* note 39.

crime scene—ensure that the threat has ceased, secure any weapons or vehicles at the scene, place suspects in custody, check on the condition of other officers, search the person who has been shot, ensure witnesses do not depart, call paramedics—and requiring an officer to provide first aid adds an additional layer of duties to an already overburdened officer.

The final argument against requiring officers to provide first aid to a suspect is the emotional difficulty of providing aid to a suspect whom he has just shot. An officer-involved shooting may be the most traumatic event an officer will experience during service.⁴² After an officer-involved shooting, many, if not most officers, will experience a period of mental confusion and disorientation.⁴³ They may experience a multitude of physical, cognitive, emotional, and behavioral responses in the immediate aftermath of the shooting.⁴⁴ Their immediate reactions may include muscle tremors, nausea, chills, vomiting, rapid heart rate, hyperventilation, faintness, crying, or sweating.⁴⁵ They are sometimes in shock and may have difficulty comprehending the reality or significance of the shooting.⁴⁶ Therefore, under such circumstances, it may be unreasonable to expect a traumatized officer to perform first aid on a suspect he or his partner may have just shot.

These and other factors help to explain why most police departments do not require that their officers perform first aid after an officer involved shooting. A review of how courts have dealt with due process challenges brought forth by survivors of police shootings is discussed in the next section.

⁴² See INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, OFFICER-INVOLVED SHOOTINGS: A GUIDE FOR LAW ENFORCEMENT LEADERS, at 23 (2016), https://www.theiacp.org/sites/default/files/2018-08/e051602754_Officer_Involved_v8.pdf.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 23.

⁴⁵ *Id.*

⁴⁶ *Id.*

V. COURT DECISIONS

Although the Supreme Court has held that suspects who suffer an injury during arrest should receive “the needed medical treatment,”⁴⁷ the Court has so far not defined what constitutes treatment and who is obligated to provide it. The Court has also refused to consider the issue of whether an officer violates the Constitution by failing to provide first aid to an individual whom they have shot.⁴⁸ Several lower courts, however, have considered the issue and have typically resolved the issue in favor of the officers who failed to render any first aid after a police-involved shooting.

In *Stevens-Rucker v. City of Columbus*,⁴⁹ Columbus, Ohio police officers responded to a 911 call about an alleged burglar who was in an apartment holding a large kitchen knife.⁵⁰ After arriving at the scene the officers encountered Jason White, a 32-year-old decorated war veteran, holding a knife.⁵¹ While attempting to apprehend White, two officers shot him.⁵² According to these two officers, they shot White because White was holding a knife and was close enough to strike them.⁵³ Immediately after the shooting, several officers converged on the scene.⁵⁴ One officer took the knife from White’s hand, rolled him onto his stomach, and placed handcuffs on him.⁵⁵ None of the officers at the scene attempted to provide any emergency medical assistance.⁵⁶ In justifying their failure to render aid at the scene, Sergeant Frenz, one of the officers on the scene, stated in his deposition that “Because I believed more thoroughly trained medics would be arriving quickly, I did not believe it was necessary for me or any other CPD [Columbus Police Department] officers on the scene to provide First Aid, CPR, or any type of medical attention to the suspect.”⁵⁷ In addition, both Sergeant Frenz and Officer McKee,

⁴⁷ *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 245 (1983).

⁴⁸ *See Stevens-Rucker v. Frenz*, 139 S.Ct. 1291 (2019).

⁴⁹ 739 Fed. Appx. 834 (6th Cir. 2018).

⁵⁰ *Id.* at 835–36.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 838.

⁵⁴ *Stevens-Rucker*, 739 Fed. Appx. at 838.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 845.

another officer on the scene, indicated that they did not believe that any assistance would have saved White's life.⁵⁸ An emergency medical squad arrived about fifteen minutes later.⁵⁹ They checked White for vital signs but, finding none, pronounced him dead.⁶⁰

The administrator of White's estate filed a suit against the City of Columbus claiming a violation of White's due process rights as a result of the officers' deliberate indifference to his serious medical needs.⁶¹ The Sixth Circuit Court of Appeals rejected the claim holding that an officer discharges his constitutional duty by seeking prompt medical assistance.⁶² According to the Sixth Circuit:

[A]n officer is charged with providing a detainee with prompt medical attention. However, this attention does not require the officer to intervene personally. Imposing an absolute requirement for an officer to do so ignores the reality that such medical situations often call for quick decisions to be made under rapidly evolving conditions. As long as the officer acts promptly in summoning aid, he or she has not deliberately disregarded the serious medical need of the detainee even if he or she has not exhausted every medical option.⁶³

Other circuits are in agreement with the Sixth Circuit that an officer discharges his responsibility to a detainee by summoning medical care. In *Maddox v. City of Los Angeles*,⁶⁴ Los Angeles police officers came upon Donald Roy Wilson standing naked in the middle of a busy street.⁶⁵ They believed that he had taken Phencyclidine (PCP).⁶⁶ An altercation ensued when they attempted to take Wilson into custody.⁶⁷ After Wilson became belligerent while riding in the police car to the hospital, an officer applied a chokehold for twenty to thirty seconds.⁶⁸ When they reached the

⁵⁸ *Id.*

⁵⁹ Stevens-Rucker, 739 Fed. Appx. at 838.

⁶⁰ *Id.*

⁶¹ *Id.* at 836.

⁶² *Id.* at 846.

⁶³ *Id.*

⁶⁴ *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986).

⁶⁵ *Id.* at 1411.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

hospital the officers could not find a pulse.⁶⁹ Although they were trained in CPR the officers did not attempt any First Aid.⁷⁰ After he arrived at the hospital, the medical staff commenced CPR on Wilson, but he did not respond and was pronounced dead.⁷¹

His estate filed suit against the City of Los Angeles and various police officers for their failure to render First Aid after they applied the chokehold.⁷² The Ninth Circuit held that “[d]ue process requires that police officers seek the necessary medical attention for a detainee when he or she has been injured while being apprehended by either promptly summoning the necessary medical help or by taking the injured detainee to a hospital.”⁷³ According to the Court, the police fulfilled their obligation to the detainee by promptly taking him to the hospital to obtain medical care.⁷⁴

Claims by plaintiffs of failure to render aid against police officers have been successful when the officers in question have failed to either summon paramedics or take the injured suspect to the hospital.⁷⁵ The lawsuit that was the subject of *Owensby v. City of Cincinnati*⁷⁶ occurred as a result of a contentious police encounter with Roger Owensby.⁷⁷ Owensby was beaten, sprayed with mace, and asphyxiated.⁷⁸ One officer remarked to two other officers that Owensby appeared to be bleeding and was unable to breathe.⁷⁹ Nevertheless, neither officer attempted to investigate Owensby’s condition.⁸⁰ Thereafter, at least thirteen police officers were on the scene or in the immediate vicinity of Owensby—three of whom were trained emergency medical technicians—yet no officer on the scene attempted to provide any assistance to Owensby or summoned paramedics.⁸¹ Video of the crime scene

⁶⁹ Maddox, 792 F.2d at 1411.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Maddox, 792 F.2d at 1415.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *See Owensby v City of Cincinnati*, 414 F.3d 596 (6th Cir. 2005).

⁷⁶ *Id.*

⁷⁷ *Id.* at 599.

⁷⁸ *Id.* at 600–01.

⁷⁹ *Id.* at 600.

⁸⁰ Owensby, 14 F.3d at 600.

⁸¹ *Id.* at 600–01.

indicated that instead of assisting Owensby or summoning emergency medical technicians, the officers on the scene greeted each other, secured items that might have dropped, prepared for the arrival of their supervisors and made sure their uniforms were intact.⁸² At least six minutes elapsed before paramedics were summoned and they arrived at least four minutes later.⁸³ They were unable to resuscitate Owensby and the coroner ruled his death a homicide resulting from police intervention: asphyxiation during restraint attempts.⁸⁴ The Sixth Circuit held that the officers were deliberately indifferent to Owensby's medical needs: "[W]e note in summary that each officer viewed Owensby in significant physical distress, yet made no attempt to summon or provide any medical care until several minutes later"⁸⁵

These courts have imposed a very limited duty on the police after shooting or injuring a suspect to either simply summon medical assistance or take him to the hospital. I will explain in the next section why the police have a broader duty to those whom that they have shot or injured than these courts have imposed.

VII. WHY POLICE MUST HAVE A DUTY TO RENDER AID

A. *Corrections Officers and Prisoners*

When an individual is incarcerated, the Eighth Amendment prohibits the government from inflicting cruel and unusual punishments.⁸⁶ In *Estelle v. Gamble*, the Supreme Court has held that in some circumstances the Eighth Amendment is violated when an inmate is denied medical care.⁸⁷ In *Estelle*, the Court recognized the practical reality that "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met"⁸⁸ Thus, the Court held, the Eighth Amendment proscribes not only "physically barbarous punishments,"⁸⁹ but also "deliberate indifference to serious medical needs of prisoners."⁹⁰ According to the Court, such indifference could be shown "by prison

⁸² *Id.*

⁸³ *Id.* at 601.

⁸⁴ *Id.*

⁸⁵ *Id.* at 603.

⁸⁶ U.S. CONST. amend. VIII.

⁸⁷ *See Estelle v. Gamble*, 429 U.S. 97 (1976).

⁸⁸ *Id.* at 103.

⁸⁹ *Id.* at 102.

⁹⁰ *Id.* at 104.

doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care."⁹¹ Any prison official can be found liable under the Eighth Amendment whenever "the official knows of and disregards an excessive risk to inmate health or safety."⁹²

When a suspect is shot by the police, he is not an inmate in prison, and therefore the protections of the Eighth Amendment would not be applicable.⁹³ However, the logic of *Estelle* certainly extends to such situations as there are few times when a citizen is more at the mercy of law enforcement agents than after he has been incapacitated from the application of lethal force and is within the control of the agents. In such a situation he is arguably even more vulnerable than an incarcerated inmate and equally dependent on law enforcement authorities to address his acute medical needs. After being shot he has clearly been seized by the police.⁹⁴ When arrestees and pretrial detainees have been shot are in the same position as incarcerated inmates in that they are not free and able to obtain medical care for themselves. Instead, they must rely solely on the same police who injured them to come to their aid and render to them immediate medical aid.

B. *Soldiers and Their Enemies*

Soldiers have much in common with police in that part of their jobs will inevitably entail the use of lethal and life-threatening force against other human beings. The lawful objects of such violence are members of enemy-organized armed groups and civilians who forfeit their protection from deliberate attack by taking a direct part in hostilities. In these situations, the soldier is therefore using force against individuals she knows are seeking to inflict death or great bodily harm on the soldier herself and members of her unit. Yet international humanitarian law imposes a clear and universally-applicable obligation to come to the aid of the wounded enemy who has been rendered "out of the fight" as the result of wounds or sickness at the first feasible opportunity.⁹⁵ Indeed, this obligation and the desire to ameliorate the suffering of the wounded and sick on the battlefield was the genesis of the first Geneva Convention and the foundation for the entire Geneva humanitarian tradition.⁹⁶

⁹¹ *Id.*

⁹² *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁹³ *See Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977) (Eighth Amendment is not applicable to government until "after it has secured a formal adjudication of guilt").

⁹⁴ *See Tennessee v. Garner*, 471 U.S. 1 (1985).

⁹⁵ *See supra* note 6 and accompanying text.

⁹⁶ *See Inter-American Comm'n H.R., Detainees in Guantanamo Bay, Cuba, Request for Precautionary Measures*, 532–33 (March 12, 2002), excerpted in 41 I.L.M. 532 (2002)

This seems indeed ironic: unlike police, soldiers have an obligation toward the very enemy who was just trying to kill them once that enemy becomes incapacitated by wounds. The laws of war require that a soldier provide care to the sick and wounded during battle based only on medical considerations, with no consideration of nationality or loyalty playing a role. Accordingly, it is quite common that the obligation will require prioritizing the care of the captured enemy over friendly casualties.⁹⁷ One commentator has noted that the reasons for requiring soldiers to aid those whom they have wounded are equally applicable to police officers who shoot suspects:

Soldiers and police have much in common. They sacrifice for the common good, follow an established set of rules and ethics that demands compliance in order to be considered a professional, and, perhaps most notably, are required to move towards danger in the interests of service to society. This is not a natural instinct. Most would agree that it is counterintuitive to put oneself in harm's way, or to attempt to take another life. Even more counterintuitive is following a rule that requires efforts to save the same life you're are trying to end. But soldiers do it, and they do it often. The international laws of war, and more specifically provisions in the Geneva Conventions, require soldiers to only not leave the wounded and sick without care, but to give them, to the fullest extent practicable, and with the least possible delay, the medical care and attention they need. The rule applies to both friendly and enemy fighters, and priority of medical care depends largely on one thing: he who needs the care most gets the care first. You read that correctly: an American soldier is often obligated to render first aid to a wounded and incapacitated enemy fighter before he does to his own friendly forces . . . They routinely extend the hand of humanitarian protection to individuals who only moments earlier were trying to kill them.⁹⁸

(. . . "international humanitarian law generally does not apply in peacetime and its principal purpose is to place restraints on the conduct of warfare in order to limit or contain the damaging effects of hostilities and to protect the victims of armed conflict, including civilians and combatants who have laid down their arms or have been placed hors de combat.").

⁹⁷ See *supra* note 6 ("They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.").

⁹⁸ Joseph Morse, *Our police should be required to treat those they wound—just as our soldiers are*, FOREIGN POL'Y (Sept. 3, 2015), <https://foreignpolicy.com/2015/09/03/our-police-should-be-required-to-treat-those-they-wound-just-as-our-soldiers-are-2/?fbclid=IwAR311x9eF183nFLbPwOwOzcD8ie87jzWVInJGFAC9ZQL9HVkrPgxbxXop4> (emphasis in original).

Police officers should owe an analogous duty to assist those whom they have wounded. This means officers should be required to do more than contact paramedics after seriously wounding a suspect; as is unfortunately all too well established by the experiences of combat, the moments immediately after a shooting are critical and often make the difference between life and death. This means the police officer on the scene will often be in the best position to render immediate aid. The Seattle Police Department policy provides an example of a standard that would align the police officer's obligation with that of the soldier in battle. That policy requires that "[w]hen safe and feasible, officers will request a medical aid response for any apparent injury, complaint of injury, or sign of medical distress for subjects and others even if the aid is declined."⁹⁹ In addition, "after requesting a medical aid response, officers will render aid within the scope of their training unless aid is declined . . . Consent should be assumed for unconscious subjects or subjects incapable of providing consent."¹⁰⁰

By requiring police officers to render first aid to those whom they have shot, the courts are respecting the sanctity of life and rule of law. Common decency demands that police do not ignore an arrestee while he is in obvious distress. The same deliberate indifference standard should apply to arrestees and pretrial detainees under the due process clause. "Regardless of how evidenced, deliberate indifference to [an arrestee's] serious illness or injury [should] state a cause of action under § 1983."¹⁰¹

There are, of course, circumstances in which an officer should not be required to render aid. One obvious circumstance would be when rendering first aid would endanger the officer or others, interestingly a limitation aligned with the obligation established by the laws of war. An officer should also be excused from rendering aid when doing so would risk evidence being lost. An officer, however, should not be excused from rendering first aid due to a lack of training. Police departments should train their officers to administer first aid which includes treating gunshot wounds. Training officers to treat gunshot wounds would not be overly burdensome to the officer nor the police department. The Boston police department policy is a good example of a reasonable policy in this regard:

Traditionally police officers have been expected to have more than ordinary knowledge about first aid and the care and treatment of the injured. In order to prepare members of this force to cope with the many demands for their assistance this department has maintained instructional

⁹⁹ See *supra* note 33.

¹⁰⁰ See *supra* note 33.

¹⁰¹ *Estelle v. Gamble*, 429 U.S. 97 (1976).

courses so that all sworn personnel would be able to assist the sick and injured.¹⁰²

A police department which fails to provide this basic training should be liable to any individual who was shot by one of its officers and to whom first aid was not reasonably attempted.

In addition to respecting the sanctity of life, there are other reasons the police should have a legal duty to aid those whom they have shot. First, providing aid to an arrestee may preserve the suspect's right to due process and his presumption of innocence. A suspect who dies after being shot will never have his day in court and will be forever tainted with criminal suspicion. Second, police shootings have become a highly contentious issue. It is much easier to determine whether the shooting was justified if the suspect lives. Third, because most police departments now require their officers to wear body cameras, the public will have an opportunity to view the aftermath of a police shooting. It is a bad look when police are standing around while a suspect is dying. If officers are instead seen attempting to administer first aid to a suspect, public confidence in the police will be enhanced. Finally, in criminal law one does not have a general duty to aid others who may be in peril.¹⁰³ However, there's a longstanding exception for those who are responsible for putting others in peril.¹⁰⁴ Whether or not the shooting is justified, by shooting an arrestee the police officer has created the peril that the individual is in and therefore requiring the officer to render aid is consistent with the longstanding exception.

VIII. CONCLUSION

When an incarcerated inmate is sick or wounded, he is at the mercy of correction officials to address his medical needs. Similarly, those wounded in battle are at the mercy of those who wounded them. In both instances, the law imposes a duty to assist those who have been wounded and are in need of immediate medical care because in both instances, the correction officer and the soldier are in the best position to render aid. Criminal suspects who have been shot and wounded are also at the mercy of the police officers who shoot them. Police officers are in the best position to render immediate medical aid. Therefore, the law should impose the same duty on police officers who shoot arrestees as they have imposed on correction officials and soldiers. To date the courts have recognized only that due process requires that officers contact paramedics after they shoot or injure a suspect. Due

¹⁰² See Boston Police Department, *Rules and Procedure*, Rule 203, Sec. 1, available at <https://bpdnews.com/rules-and-procedures/>.

¹⁰³ *People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907) ("the duty neglected must be a legal duty, and not a mere moral obligation.").

¹⁰⁴ See *United States v. Hatatley*, 130 F.3d 1399, 1406 (10th Cir. 1997) ("When a person puts another in position of danger, he creates for himself a duty to safeguard or rescue the person from that danger.").

process requires more than that. If officers recognize that an arrestee is in distress and are able to provide immediate medical aid to an injured suspect or other pretrial detainee without endangering themselves or the public, the law should require them to do so. Failure on an officer's part to provide such assistance is a violation of due process and courts should recognize it as such.